SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 862

HERMAN A. HINZE, CARL E. STURM, ENDRE A. SHARPEE, ET AL.

vs. *Petitioners,*

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below.

The opinion of the Supreme Court of the State of Wisconsin appears in the record pages 124 to 140, and is reported in 241 *Wisconsin* 394, and in 6 *Northwestern* (2) 330.

In the interest of brevity, no statement of the case as such is made herein except as it relates to the question of jurisdiction and argument on the case. A summary is made under the title "Summary of Actions in the State Courts" appearing in the annexed Petition.

Jurisdiction.

(A) This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A., 344 (b)) which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it

for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; *or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution,* or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *." (Emphasis supplied.)

(B) Petitioners also rely on Rule 38 of the Rules of this Court, and particularly on Paragraph 5 thereof, which, in part, provides:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this court."

(C) Date of Judgment, and Date of Application for Appeal.

The date of the final decree of the Supreme Court of the State of Wisconsin, which is now sought to be reviewed, was November 10, 1942. Appellants' (petitioners here)

motion for rehearing was denied December 29, 1942. The time for taking the appeal began to run on the date of the denial of said motion for rehearing, to wit: December 29, 1942. (*Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31.)

This petition for writ of certiorari is filed within three months of said time, as provided by section 330, title 28, of the United States Code.

(D) Raising of the Questions In State Courts.

In addition to briefs filed by counsel in the Circuit Court for Dane County, the record shows that the questions of service and due process were emphasized in said proceedings.

In the order to show cause, heard below on April 24, 1942, (R. 34) the petitioner stated:

> "* * * that from his investigation of the facts and interviewing numerous policyholders, as well as from his own experience, the policyholders were not informed as to the basis of or the nature of the assessment made by the order of November 29, 1941; that an examination of the record in this case indicates that neither the petition nor the plan of assessment was ever served upon the insurance company, its officers or policyholders, the only service being by publication in the Wisconsin State Journal (Madison, Wis.) while policyholders affected to the extent of about 10,000, lived in all parts of the state * * *." (Parenthetical matter supplied.)

and further stated (R. 39):

> "* * * and of the failure of the Commissioner of Insurance to give adequate notice to the policyholders of the plan of assessment proposed by him * * *"

Approximately 44 affidavits were attached to said order to show cause, and were incorporated therein by reference

and made a part thereof, stating in substance (1) that the "First Notice of Assessment" (which in most cases was received during December, 1941, and January, 1942) was the first information that these affiants had of any assessment levied against them, and (2) that they did not read or see in any newspaper, including the *Wisconsin State Journal,* any published notice of the order to show cause which resulted in the assessment order of November 29, 1941, and (3) that they had no notice of any intention to assess, or of indication that they were liable to assessment (R. 43-46).

These contentions were further supported by the affidavits of five other policyholders (petitioners here), stating that they had talked to more than 600 policyholders (R. 40-43) living in all parts of the State of Wisconsin.

The same issues as to service, jurisdiction, and the denial of Constitutional rights were brought before the Supreme Court of the State of Wisconsin at the earliest opportunity (R. 142, 175-197). The purpose of the motion and brief for rehearing filed was to bring before the court the issues, including some of the federal questions involved, relating to the two orders of May 26, 1942, which had been deferred and reserved at the request of the court:

> "This motion is made necessary for the following reasons: First, because at the suggestion of the Court, at the time of the hearing, the questions which were raised in the two petitions of the appellants, heard on April 1st and April 24, in the court below, were reserved and were not ruled upon. These questions are of vital interest to the appellants." (R. 153, 154.)

The decision represented a surprise and was unexpected, in view of the court's request for deferment of the questions referred to above, and in addition was unforeseen in view of the previous decisions of said court as will be seen from

citations of authorities given in motion and brief (R. 141-209). The petitioners claimed, and had, a right to be heard on their Constitutional rights.

International Steel & Iron Co. v. *National Surety Co.*, 297 U. S. 657, 665;

Saunders v. *Shaw*, 244 U. S. 317, 320;

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 677, 678;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320.

Specification of Error.

First. The court erred in holding that "due notice thereof having been given" in the levy of this assessment, it was not in conflict with, and in violation of, the provisions of the 14th Amendment to the Constitution of the United States in that the State of Wisconsin, by and through the acts of its Commissioner of Insurance, assumes and seeks

(A) to deprive these petitioners, and certain other citizens of the United States and of the State of Wisconsin, of rights, privileges, and immunities secured to other citizens of the United States and of the said State;

(B) to deprive these petitioners and other citizens of the United States and of the State of Wisconsin, of liberty and property without due process of law; and

(C) to deprive and to deny these petitioners and certain citizens and persons within the jurisdiction of the State of Wisconsin, of the equal protection of the laws.

Second. The court erred in holding that these petitioners have no right to a trial on the assessment order, depriving them of liberty and property without due process of law, and depriving them of the equal protection of the laws.

Third. The court erred in holding that "provision for refund of such excess" does not deprive these petitioners of liberty and property without due process of law.

Fourth. The court erred in holding that the assessment as levied did not constitute an impairment of the obligation of contract, and was not in conflict with, and in violation of, Article I, Section 10, of the Constitution of the United States.

ARGUMENT.

I.

Failure to give proper notice and grant trial, is a substantial question of due process of law.

As restated in *Ex Parte Wall,* 107 U. S. 265, and *Cooley's Constitutional Limitations,* 353:

> " 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society'."

(A) No citation of authority is needed to illustrate that one of the most essential elements of due process of law is proper notice.

(B) Likewise, and as a part of the requirement of notice, an opportunity for hearing is one of the most essential elements of due process of law. These petitioners will be divested of their property unless allowed a hearing before an impartial tribunal, where they can contest the claims

set up against them and be allowed to meet them on the law and the facts.

Iron Cliffs Co. v. *Negaunee Iron Co.*, 197 U. S. 463, 49 L. Ed. 836, 25 S. Ct. 474;

Ames v. *Port Huron Log Driving & Boom Co.*, 11 Mich. 139, 83 Am. Dec. 731;

Stuart v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

American Jurisprudence, Constitutional Law, Vol. 12. "When the right to a hearing is denied, the mere giving of a notice is ineffectual for any purpose within the meaning of the constitutional guaranty. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. For example, ordering one to pay alimony without having had his day in court and without a hearing on the question of the marriage, when that is denied, amounts to a taking of his property without due process of law. Again, a forfeiture without notice to the owner of property and without opportunity of being heard on the question of his culpability has also been held to amount to the denial of due process of law."

Citations: *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914;

Hite v. *Hite*, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, 71 Am. St. Rep. 82.

II.

Failure to give notice as required in special proceedings is a denial of equal protection of the laws and lacks due process—This is a special proceeding requiring strict compliance with the law.

Substituted service and service by publication were unknown to the common law and depend upon statutory authorization, and there must be a strict compliance with the law.

We find that this was not done, as shown by quotations from section 262.14 of the Wisconsin Statutes, reading as follows:

> "Service by publication in special proceedings: *Service by publication of any process or notice in any special proceeding, except probate proceedings, may be made when the plaintiff is unable with due diligence to make service of such process or notice upon the defendant or party upon whom such service is required.* Such publication and proof thereof shall be made as required by Section 262.13." (Emphasis supplied.)

Section 262.13 provides as follows:

> "Publication or service outside state; proof of grounds; mode of service:
>
> "(1) Before entering judgment against any defendant who has been served with summons by publication or personally without the state pursuant to Rule 262.12 and who has not appeared, *the Court shall require proof by affidavit* or other evidence to be made and filed of the non-residence of the defendant where not shown by the verified complaint *and of the existence of any other fact not shown by the verified complaint and necessary to authorize service to be made by publication and that the service was in fact made as the rule requires.* The court may require additional proof. Said proof shall be conclusive in all collateral actions and proceedings.
>
> "(2) Service of the summons by publication shall consist of its publication in a newspaper *likely to give notice* to the defendant, to be published once a week for three weeks and in case the defendant's post-office address is known or can be ascertained, *by mailing him a copy of summons and complaint,* or a notice of the object of the action, as the case may require. The

mailing may be omitted if the post-office address cannot be ascertained."

The Supreme Court of Wisconsin itself has defined this to be a special proceeding (R. 126). See also *Wisconsin Statutes,* section 260.02; *Cornish* v. *Milwaukee & Lake Winnebago Railway Co.,* 60 Wis. 476; *People* v. *San Luis Obispo Bank,* 152 Cal. 261, 92 Pac. 481.

The Commissioner of Insurance did not (1) file proof by affidavit or other evidence to authorize service by publication; (2) publish in newspapers "likely to give notice" to policyholders living in all parts of the State; and he and his department had possession of records containing addresses of such policyholders, as evidenced by the fact that Yaudes testified (R. 61) that there were a definite number of policyholders (9500) and a definite number of policies (15000), and by the fact that policyholders were notified by mail (by the insurance department) of the amount of their assessments (R. 32-33).

III.

Substantiality of Questions Involved.

An analysis of the cases which have come before this Court indicate that the precise question here involved has not before been presented. The cases deal mostly with non-residents on a question of substituted service or notice by publication, and are distinguished in almost all cases from the present one by the fact that mail service WAS made and actual notice given. We have no challenge respecting decisions such as *Hawkins* v. *Glenn,* 131 U. S. 319, in which it was held that where a company was lawfully sued by its corporate name, "the individual stockholders were not proper parties to such a suit, the president and the directors being, by their selection, their representatives for

this purpose." That case is distinguished from the present one, in that the corporation and its officers continued in that case to represent the corporation even after the trustee was appointed, because under the statute there involved, the corporation could sue and be sued as before for the purpose of collecting debts due it and enforcing liabilities against it. Such is not true in the present case.

In addition, the corporation and officers of the Wisconsin Mutual Insurance Company were not summoned into court (R. 8), and in fact, were restrained by the terms of the order from taking any part (R. 3):

> "6. It is further ordered that the said Wisconsin Mutual Insurance Company of Madison, Dane County, Wisconsin, its officers and agents, be and they *thereby are enjoined and restrained from exercising any of the corporate rights or privileges of said company,* from collecting any of its debts, claims, or demands, or paying out any of its moneys, or transferring or disposing of any of its assets, *or interfering with the liquidation of said company by the aforesaid Commissioner of Insurance.*" (Emphasis supplied.)

In order that there be a judicial determination which would bind the policyholders, the corporation and its officers must have been served.

It was held in *Christopher* v. *Brusselback,* 302 U. S. 500, as follows:

> "In the present case no such warning has been given, for no such procedure has been prescribed. The statutes have fixed only the conditions on which liability of the stockholders is to attach, leaving to creditors as their only recourse the usual procedure of courts as the means of asserting the liability. There is nothing in the statute relating to the organization of Federal Land Banks and the imposition of the stockholders' liability to suggest that by virtue of their

membership in the corporation the stockholders *can be said to have subjected themselves to a procedure of determining* IN THEIR ABSENCE *the essential conditions of liability, or to have relinquished their right to contest, as in any other litigation, every step essential to its establishment.* As we cannot say that petitioners' membership in the bank was conditioned upon their surrender of the benefits of a procedure which would otherwise be required, there is no basis for a court to dispense with it more than in other cases in which a personal judgment is sought." (Emphasis supplied.)

In view of the restraining order in the present case, against the corporation and its officers, it is pure legal fiction to say that after that date the policyholders were, or could be, represented by the corporation. This is an entirely different situation from that in *Hawkins* v. *Glenn, supra,* where the corporation as such continued to function. It appears from the record (R. 8) that after the restraining order of February 5, 1941, the officers of the corporation ceased to function, and took no further part in the proceedings. They were stripped of their authority to represent the policyholders. If, however, they could still represent policyholders, it still follows that the corporation and its officers were entitled to notice of the proceedings at which the assessment was ordered. This was not done in this case (R. 17). The fact that a corporation is served with a summons in foreclosure proceedings would certainly not justify the appointment of a receiver during the course of the foreclosure without notice to the corporation. Similarly, an order for the payment of alimony or for an injunction in an action commenced by service of process, would have no validity if the order to show cause upon which such injunction was based, was not served upon the party to be bound. Due process required that service be made.

In the following cases it will be noted that actual mail notice was given, according to statute, by mail notice:

Pink v. *A.A.A. Highway Express, Inc.*, 314 U. S. 201, 204;

Selig v. *Hamilton*, 234 U. S. 652;

Chandler v. *Peketz*, 297 U. S. 609.

For these reasons, the petition presents a substantial Federal question.

Senn v. *Tile Layers' Protective Union*, 301 U. S. 468.

In summary, "policyholders cannot be deemed to have been represented by the corporation or its officers who had been effectively enjoined from exercising any corporate powers, and failure to serve notice of the hearing upon the corporation and its officers eliminates any claim that they were the representatives of the policyholders in the present proceedings" (R. 191).

Conclusion.

Wherefore, it is respectfully submitted that this petition for certiorari should be granted.

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